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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THOMAS JEDRZEJCZYK, SONNY CHUNG,
KEVIN TINKELMAN, and DAVID LEWIS,
individually, and on behalf of all others similarly
situated.

Plaintiffs.

V.

SKILLZ INC., f/k/a FLYING EAGLE
ACQUISITION CORP., ANDREW PARADISE,
CASEY CHAFKIN, MIRIAM AGUIRRE, SCOTT
HENRY, HARRY SLOAN, JERRY
BRUCKHEIMER, CHRISTOPHER GAFFNEY,
VANDANA MEHTA-KRANTZ, KENT E.
WAKEFORD, CITIGROUP GLOBAL MARKETS,
INC., GOLDMAN SACHS & CO. LLC, JEFFERIES
LLC, UBS SECURITIES LLC, WEDBUSH
SECURITIES INC., WELLS FARGO SECURITIES,
LLC, CANACCORD GENUITY LLC, STIFEL,
NICOLAUS & COMPANY, INC.,

Defendants.

Case No.: 3:21-cv-03450-RS

**SKILLZ DEFENDANTS' NOTICE
OF MOTION AND MOTION TO
DISMISS LEAD PLAINTIFFS'
CLASS ACTION AMENDED
CONSOLIDATED COMPLAINT
FOR VIOLATIONS OF FEDERAL
SECURITIES LAWS**

Hearing: April 21, 2022

Time: 1:30 p.m.

Location: Courtroom 3 – 17th Floor

Judge: Hon. Richard Seeborg

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on April 21, 2022, at 1:30 p.m., or as soon thereafter as
 3 the matter may be heard, in the United States District Court for the Northern District of California,
 4 located at 450 Golden Gate Avenue, San Francisco, California, Defendants Skillz Inc. (“Skillz” or
 5 the “Company”), Andrew Paradise, Casey Chafkin, Miriam Aguirre, Scott Henry, Harry Sloan,
 6 Jerry Bruckheimer, Christopher Gaffney, Vandana Mehta-Krantz, and Kent E. Wakeford (with
 7 Skillz, the “Skillz Defendants”), will move to dismiss the Class Action Amended Consolidated
 8 Complaint for Violations of Federal Securities Laws (“Amended Complaint” or “AC”) (Dkt. 76),
 9 filed by Plaintiffs Thomas Jedrzejczyk, Sonny Chung, Kevin Tinkelman, and David Lewis.

10 The Skillz Defendants move pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6)
 11 and the Private Securities Litigation Reform Act of 1995 (“PSLRA”). All of Plaintiffs’ claims
 12 under Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) and Sections 11
 13 and 12(a)(2) of the Securities Act of 1933 (the “Securities Act”) fail because Plaintiffs do not
 14 allege particularized facts establishing any false or misleading statements or omissions, and
 15 Plaintiffs’ Exchange Act claims also fail because Plaintiffs have not pleaded with particularity that
 16 any defendant acted with scienter or loss causation. The Securities Act claims additionally fail
 17 because the only plaintiff to allege them (Plaintiff Tinkelman) lacks standing to sue. And finally,
 18 lacking any predicate violation, Plaintiffs’ claims under Section 20 of the Exchange Act and
 19 Section 15 of the Securities Act must also be dismissed.

20 **ISSUES TO BE DECIDED**

21 1. Whether Plaintiffs’ claim under Section 10(b) of the Exchange Act should be
 22 dismissed for failure to plead with particularity a false statement of fact, scienter or loss causation.

23 2. Whether Plaintiff Tinkelman’s claims under Sections 11 and 12(a)(2) of the
 24 Securities Act should be dismissed for failure to plead with particularity a false statement of fact
 25 or adequately allege standing.

26 3. Whether Plaintiffs’ claims under Section 20(a) of the Exchange Act and Section 15
 27 of the Securities Act should be dismissed for failure to plead a predicate violation.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is not the typical securities fraud action that arises after a company announces bad
 4 news and its stock price declines. Despite the gloomy picture Plaintiffs try to paint, they
 5 acknowledge that Skillz—a small mobile gaming technology start-up that went public in
 6 December 2020—consistently expanded its revenues, user base, game offerings, and strategic
 7 partnerships throughout the time period described in the Amended Complaint. In fact, Skillz’s
 8 revenues for 2021 through the filing of that complaint are nearly double those of the same period
 9 last year—jumping from \$160 million to \$275 million.

10 This case was triggered not by any revelation of fraud (or even of genuinely new
 11 information) but rather by two “short reports,” written by investors with financial interests in
 12 driving down Skillz’s stock price. Wolfpack and Eagle Eye both held short positions in Skillz’s
 13 stock, meaning they stood to profit if Skillz’s stock price went down and would lose money if the
 14 price was up. In March and April 2021, they published reports that spun Skillz’s disclosures of
 15 game downloads and user engagement in a negative light and questioned the strength of its
 16 platform. Unfortunately, this has become an increasingly common practice—short sellers issue
 17 dramatic but unsubstantiated “reports” with vague negative claims, depressing the stock price (to
 18 their benefit), and triggering shareholder lawsuits. And that is just what happened here: after each
 19 short report, Skillz’s share price temporarily declined, and even though it quickly recovered, this
 20 lawsuit followed. But courts have repeatedly concluded that securities fraud claims based on self-
 21 interested short reports issued with a financial incentive to depress the Company’s stock price are
 22 not sufficient under the rigorous standards of the PSLRA and should be dismissed.

23 Plaintiffs’ Amended Complaint does not state a claim under either the Exchange Act or the
 24 Securities Act. Plaintiffs (1) have not identified an actionable misstatement, (2) have not pleaded
 25 any facts, much less the required strong inference, indicating that any Skillz Defendant acted with
 26 an intent to deceive investors, and (3) have not explained how any Plaintiff’s alleged losses were
 27 caused by the revelation of some wrongfully concealed information. In addition, Plaintiff
 28

1 Tinkelman—the only Plaintiff purporting to bring Securities Act claims—does not adequately
 2 allege standing to assert any claim under that Act. The Amended Complaint should be dismissed.

3 **No False Statement.** The Amended Complaint challenges a laundry list of statements,
 4 covering everything from game downloads to revenues to international expansion aspirations—
 5 but Plaintiffs have not pleaded facts establishing that any challenged statement was false at the
 6 time it was made or identified any information that Skillz was required to disclose earlier but
 7 didn't. The statements were all factually true at the time they were made or are non-actionable
 8 forward-looking projections. Without a false statement of fact or wrongful omission, all of
 9 Plaintiffs' claims fail.

10 **No Scienter.** Plaintiffs' Exchange Act claims fail for the additional, independent reason
 11 that they plead no basis to infer that any defendant acted with an intent to deceive, manipulate or
 12 defraud—much less a “strong inference” that is “at least as compelling” as any competing
 13 inference, as required by the PSLRA. Plaintiffs do not allege facts showing that any defendant was
 14 *even aware* of any information contradicting any challenged statement at the time it was made,
 15 much less acted with an intent to defraud.

16 **No Loss Causation.** Plaintiffs also cannot sustain an Exchange Act claim because they
 17 have not adequately pleaded losses caused by the revelation of a fraud to the market. Their loss
 18 causation allegations are based entirely on the short reports and Skillz's limited restatement of data
 19 about warrants in response to new interpretations by regulators. Neither revealed any new facts,
 20 let alone a fraud; instead, the short reports spouted negative speculation to advance their authors'
 21 ends by pushing Skillz's stock price down, and the restatement updated prior truthful accounting
 22 disclosures to conform to new SEC guidance (a routine consequence of revising standards that
 23 prompted updates from hundreds of other companies too, without triggering hundreds of lawsuits).

24 The Skillz Defendants respectfully request dismissal of the Amended Complaint.

25 **II. BACKGROUND**

26 **A. The Skillz Defendants**

27 Founded in 2012, Skillz's mission is to make electronic sports accessible to everyone via
 28 a “mobile gaming platform that allows individuals to play video games in contests against each

1 other, using their smartphone or tablet.” AC ¶ 3. Two types of contests are available on Skillz’s
 2 gaming platform: “paid” contests, where users deposit real money for a chance to win cash prizes
 3 by playing against other users, and “practice” contests, where users play games for free. *Id.*. Skillz
 4 generates revenue by collecting a percentage of the total entry fees deposited in paid contests. AC
 5 ¶ 5. Skillz grows its business both by attracting more users to download Skillz-integrated games
 6 generally as well as to enter into paid competitions. AC ¶¶ 79-80. In the future, Skillz anticipates
 7 that it will be able to introduce advertising and other offerings so that it can earn revenues from all
 8 users, not just paid competitions. Ex. A (10/13/2020 SEC Correspondence), at 9.

9 On December 16, 2020, Skillz went public by merging with Flying Eagle Acquisition
 10 Corporation (the “Merger”). On March 18, 2021, Skillz launched a secondary underwritten public
 11 offering pursuant to a registration statement on SEC Form S-1 (the “March 2021 Offering”).

12 The initial complaint in this lawsuit alleged Exchange Act claims against Skillz, along with
 13 its CEO Andrew Paradise, former CFO Scott Henry, Chief Revenue Officer Casey Chafkin, former
 14 Chief Technology Officer Miriam Aguirre, and one director, Harry Sloan. The Amended
 15 Complaint adds additional challenged statements to the Exchange Act claims, tacks on Securities
 16 Act claims based on a subset of the statements challenged under the Exchange Act, and names
 17 other members of Skillz’s Board of Directors—Jerry Bruckheimer, Christopher Gaffney, Vandana
 18 Mehta-Krantz, and Kent E. Wakeford (the “New Defendants”). The only claims alleged against
 19 the New Defendants are Securities Act claims based on the challenged statements in the March
 20 2021 Offering materials.

21 **B. The Short Reports**

22 On March 8, 2021, Wolfpack published a report questioning Skillz’s projections of future
 23 revenue. AC ¶ 17; *see also* Ex. B (the “Wolfpack Report”) at 1. The Wolfpack Report claimed that
 24 third-party app data showed downloads of three games developed on the Skillz platform were
 25 declining at certain points in time. AC ¶¶ 17, 166; Ex. B (Wolfpack Report) at 1. The Wolfpack
 26 Report also alleged that Skillz’s platform cannot “adequately handle” synchronous play and
 27 matchmaking for “large studios.” AC ¶ 167; *see also* Ex. B (Wolfpack Report) at 10. On April 19,
 28 2021, Eagle Eye published a report claiming that Skillz was recognizing revenue from incentives

1 it had given players to participate in games developed on the Skillz platform. AC ¶ 169; Ex. C (the
 2 “Eagle Eye Report”) at 1.

3 Both Wolfpack and Eagle Eye admitted to holding short positions in Skillz stock *at the*
 4 *time of their reports*, meaning that they had borrowed Skillz shares and sold them at market price,
 5 betting that Skillz’s stock price would decline so that they could purchase the same number of
 6 Skillz shares they borrowed at a lower price before they needed to return the borrowed shares. *See*
 7 17 C.F.R. § 242.200 (defining “short sale”); Ex. B (Wolfpack Report) at 1; Ex. C (Eagle Eye
 8 Report) at 1. In other words, both Wolfpack and Eagle Eye had an incentive to cause Skillz’s stock
 9 price to decline before they were due to cover their shorts.

10 On the day of the Wolfpack Report, Skillz’s stock price declined by 10.9% from \$27.45
 11 the day prior to close at \$24.45, AC ¶ 19, but completely recovered just three days later, closing at
 12 \$27.78 on March 11, 2021. Ex. D (Yahoo! Finance). On the day of the Eagle Eye Report, Skillz’s
 13 stock price declined 6.61%, from \$15.11 the day prior to \$14.11, AC ¶ 20, but more than recovered
 14 just two days later to close at \$16.76 on April 21, 2021. Ex. D (Yahoo! Finance).

15 **C. Skillz’s Continued Growth**

16 Setting aside the short reports’ self-interested spin, Skillz has demonstrated strong growth
 17 in its revenues, user base, and paying user base, including after the short reports. *Id.* ¶ 77 (citing
 18 Ex. E (11/30/20 Form S-4/A) at 170, 180); *see also* Ex. F (2020 Form 10-K) at 39; Ex. G (Q3 2021
 19 press release). Between 2019 and 2020, Skillz achieved 92% growth in revenue; a 62.5% increase
 20 in Monthly Active Users (“MAUs”), who are users “who entered into a paid or free contest hosted
 21 on Skillz’s platform at least once in a month”; and 50% growth in “paying MAU[s],” who are
 22 users “who entered into a paid contest hosted on Skillz’s platform at least once in a month.” Ex. F
 23 (2020 Form 10-K) at 27, 40, 43. In the first quarter after the Merger, Skillz achieved “record-
 24 breaking first quarter results,” “21 consecutive months of revenue growth,” and a “Paying to
 25 Playing MAU ratio” that was eight times higher than the industry average. Ex. H (Q1 2021 Press
 26 Release). Shortly after Plaintiffs filed the Amended Complaint, Skillz announced 70% revenue
 27 growth and 47% growth in paying-MAUs for the third quarter of 2021 compared to the same
 28 period in 2020. Ex. G (Q3 2021 Press Release).

1 **III. LEGAL STANDARD**

2 To state a claim under Section 10(b) of the Exchange Act, plaintiffs must plead a material
 3 misrepresentation or omission of fact, scienter, and loss causation. *See In re Rigel Pharm., Inc.*
 4 *Sec. Litig.*, 697 F.3d 869, 876 (9th Cir. 2012); *In re Nektar Therapeutics*, 2020 WL 3962004, at
 5 *9 (N.D. Cal. July 13, 2020). To survive a motion to dismiss, the claims must meet the exacting
 6 pleading standards of Rule 9(b) and the PSLRA, which “appl[y] to all elements of a securities
 7 fraud action.” *Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 605 (9th Cir. 2014).

8 To state a claim under Section 11 or Section 12(a)(2) of the Securities Act, plaintiffs must
 9 allege that a registration statement either “contained an untrue statement of material fact or omitted
 10 to state a material fact... necessary to make the statements therein not misleading.” 15 U.S.C.
 11 § 77k(a). Where claims arising under the Securities Act “sound in fraud” and are alleged in
 12 connection with a “unified course of fraudulent conduct,” they must meet the heightened pleading
 13 requirements of Rule 9(b) by setting forth “what is false or misleading about a statement, and why
 14 it is false.”¹ *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1404-05 (9th Cir. 1996); *Rubke v. Capitol*
 15 *Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2003). “A typical example of th[e] situation [where a
 16 plaintiff alleges a unified course of fraudulent conduct] is where a plaintiff alleges that the same
 17 course of conduct constitutes both securities fraud under Section 10 as well as a violation of
 18 Section 11.” *In re Violin Memory Sec. Litig.*, 2014 WL 5525946, at *8 (N.D. Cal. Oct. 31, 2014).

19 **IV. ARGUMENT**

20 **A. Plaintiffs Do Not Allege A Material Misrepresentation Or Omission Of Fact**

21 In search of a misrepresentation, Plaintiffs challenge a scattershot selection of Skillz’s
 22 public statements regarding (1) growth in app downloads; (2) expansion to India; (3) synchronous
 23 game play; (4) levels of paid user engagement; (5) user-based revenue metrics; and (6) treatment

25 **1** The Securities Act and Exchange Act claims here are inextricably intertwined. Plaintiff
 26 Tinkelman (the only Securities Act plaintiff) challenges the exact same statements under the
 27 Securities Act as Plaintiffs do under the Exchange Act, and he makes no real effort to disclaim a
 28 fraud theory. *See AC ¶¶ 220, 222, 236-37, 248, 252*. In light of this “obvious overlap,” the
 Securities Act claims are grounded in fraud. *In re Bare Escentuals, Inc. Sec. Litig.*, 745 F. Supp.
 2d 1052, 1068 (N.D. Cal. 2010) (applying Rule 9(b) to Securities Act claims).

1 of warrants.² AC ¶¶ 108-64. Plaintiffs do not explain what is false or misleading about any of the
 2 challenged statements, much less allege particularized facts indicating that they were false when
 3 made. This failure dooms all of their claims. *See Retail Wholesale & Dep’t Store Union Local 338*
 4 *Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1274 (9th Cir. 2017) (Section 10(b)); *In re*
 5 *Cloudera, Inc.*, 2021 WL 2115303, at *20 (N.D. Cal. May 25, 2021) (Sections 11 and 12(a)(2)).

6 1. Skillz Did Not Misrepresent User Engagement or Revenue From Games

7 Premised on the allegation that downloads of three of Skillz’s games were declining,
 8 Plaintiffs assert that Defendants were misleadingly “bullish” when they described user engagement
 9 and revenue from games. AC ¶¶ 108-18. But this argument fails for three reasons.

10 First, Plaintiffs unreasonably extrapolate the meaning of the challenged statements. In the
 11 statements Plaintiffs cite, Skillz (a) discussed its positive outlook on user engagement, AC ¶ 112,
 12 and (b) explained that while the most downloaded games “rotate over time”—that is, older games
 13 at some point decline in download rates—those same older games continue to grow in terms of
 14 revenue they bring in. AC ¶¶ 109, 116. Skillz did not state that downloads of specific games were
 15 increasing. To the contrary, it recognized the opposite: that the most downloaded games are
 16 constantly changing.

17 Second, there is a complete mismatch between the statements Plaintiffs cite (about user
 18 engagement and game revenues) and their basis for alleging those statements are false (decreases
 19 in free downloads for three games). Plaintiffs make no effort to explain how purported decreases
 20 in download rates of three specific games has any bearing on overall “stronger engagement” for
 21 users who by definition have already downloaded games. AC ¶ 112. User engagement involves
 22 more than downloading (which normally only occurs once), and includes post-download activities
 23 such as “match[ing] comparable players” within game contests and “creat[ing] larger
 24 tournaments,” both of which happen *after* downloads. Nor do Plaintiffs explain how alleged
 25 declines in new downloads undermines Skillz’s statements about the current value derived from
 26 certain games.

27 2 The statements in Sections IV.A.2 (regarding future expansion to India) and IV.A.5 (regarding
 28 financial results) do not appear in the March 2021 Offering materials. As such, they are not the
 subject of Securities Act claims and are not alleged as to the New Defendants.

1 *Third*, even assuming that the challenged statements referred to game download rates
 2 (again, they do not), Plaintiffs' purported support for their falsity argument is inadequate. Plaintiffs
 3 rely on the Wolfpack Report for the claim that downloads of certain games had decreased. AC ¶
 4 110; Ex. B (Wolfpack Report). On top of its admitted bias, the Wolfpack Report is unsupported:
 5 it cites to the Company's Form S-4 as its source for download declines, but the S-4 does not
 6 mention user downloads of any games, and refers only to revenues generated from certain popular
 7 games. Ex. B (Wolfpack Report) at 3 (citing Ex. I (11/17/20 Form S-4/A) at 57). And while the
 8 Wolfpack Report states those "declines" were "on track to continue" in Q1 2021, its only support
 9 for such conclusion is unspecified "Third party app data." Ex. B (Wolfpack Report) at 3. The Court
 10 need not accept such conclusory and unsupported allegations. *See Spewell v. Golden State*
 11 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

12 Plaintiffs' sole confidential witness's allegations do not "confirm" the Wolfpack Report or
 13 otherwise provide a basis to plead falsity. AC ¶ 111. First, the confidential witness ("CW") is not
 14 described with sufficient particularity for the Court to accept the allegations as true. *See Zucco*
 15 *Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 995-96 (9th Cir. 2009) (requiring that CWS be
 16 "described with sufficient particularity to establish their reliability and personal knowledge").
 17 Here, the CW is described in one instance as a member of the "Revenue Department" who held an
 18 undefined "management role" and participated in unknown "Leadership events," and in another
 19 instance as a member of Skillz's "marketing department." AC ¶¶ 103, 149. The CW apparently
 20 only worked at the Company for a few months and left in March 2021. *Id.* ¶¶ 103, 128; *Zucco*, 552
 21 F.3d at 996. Second, even if the CW's allegations had foundation, they are still not relevant to the
 22 challenged statements: the CW allegedly stated that downloads of two games were declining and
 23 that games "were not doing well," AC ¶¶ 110-12, but, again, Plaintiffs have not (and cannot)
 24 connected free user download rates to growth in gross revenue of games or user engagement after
 25 download. *See Kipling v. Flex, Ltd.*, 2020 WL 7261314, at *10 (N.D. Cal. Dec. 10, 2020) (rejecting
 26 claims based on CWS without particularized allegations establishing CWS' personal knowledge).

27 Because Plaintiffs fail to allege adequate facts demonstrating the falsity of the Skillz
 28 Defendants' statements about user engagement and revenue generated from games on the Skillz

1 platform were false, they cannot state a claim based on the statements in Paragraphs 108-118. *See,*
 2 *e.g., Hong v. Extreme Networks*, 2017 WL 1508991, at *15 (N.D. Cal. Apr. 27, 2017) (rejecting
 3 falsity allegations where “the reasons Plaintiffs offer[ed] as to why the statements [we]re false or
 4 misleading b[o]re no connection to the substance of the statements themselves”).

5 2. Skillz’s Statements About “Expectations” For Future Expansion Into India
 6 Are Neither Actionable Nor False

7 Plaintiffs’ claim that the Company misled investors when Mr. Paradise stated that Skillz
 8 “expect[s]” or is “on track” to launch its platform in India “later this year [2021],” AC ¶¶ 120-21,
 9 fares no better. Challenged only under the Exchange Act, this is a non-actionable forward-looking
 10 statement of opinion, and Plaintiffs do not allege that Mr. Paradise subjectively disbelieved the
 11 statement or set forth any particularized facts indicating that it was objectively false when made.

12 First, the challenged statements expressly reflect the Company’s expectations for the
 13 future. Both Skillz’s call to discuss quarterly earnings and the challenged blog post include a
 14 warning that some of management’s comments “will be forward-looking statements within the
 15 meaning of the federal securities laws. Forward-looking statements, which are usually identified
 16 by the use of words such as will, *expect*, should, and other similar phrases are subject to numerous
 17 risks and uncertainties that could cause actual results to differ materially from what we expect.”
 18 Ex. J (Q4 2020 Earnings Call Transcript) at 4 (emphasis added); *see also* Ex. K (Blog Post) at 4.³
 19 Both because of this meaningful cautionary language, and because Plaintiffs do not allege with
 20 particularity that the challenged statement was made with “actual knowledge... that the statement
 21 was false or misleading,” the PSLRA protects the forward-looking challenged statements. *Ronconi*
 22 *v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001); *see also Wochos v. Tesla*, 985 F.3d 1180, 1194 (9th
 23 Cir. 2021) (emphasis in original) (affirming dismissal where plaintiffs “failed to plead that
 24 Defendants *knew* their [] goal was *impossible* to achieve”). There is no such allegation of actual
 25 knowledge of falsity here, and the statements about future expansion in India are not actionable.

26
 27 ³ Skillz also warned investors that its ability to attract “players in international markets” will be
 28 “subject to the particular challenges of supporting a rapidly growing business in an environment
 of multiple languages, cultures, customs, legal systems, alternative dispute systems, regulatory
 systems and commercial infrastructures.” *See, e.g.*, Ex. E (11/30/20 S-4/A) at 74.

1 Second, even if the challenged statements were not protected by the PSLRA safe harbor,
 2 they are Mr. Paradise's opinions as to the Company's planned expansion timeline. Plaintiffs
 3 therefore must—but do not—allege particularized facts showing *both* that he did not believe the
 4 opinion *and* that it was objectively wrong at the time. *See Omnicare, Inc. v. Laborers Dist. Council*
 5 *Const. Indus. Pension Fund*, 575 U.S. 175, 183-85 (2015); *see also City of Dearborn Heights Act*
 6 *345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 615 (9th Cir. 2017). Plaintiffs do
 7 neither. There is no allegation that the Company did not plan to launch in India in 2021. *See*
 8 *Ronconi*, 253 F.3d at 430 (rejecting challenged statement regarding company's anticipated growth
 9 where plaintiffs made no allegation that defendants "actually knew" the growth would not be
 10 achieved). And Plaintiffs offer no facts indicating that, as of March or April 2021, Skillz and Mr.
 11 Paradise did not have a basis to believe expansion into India by the end of 2021 was possible—
 12 and in fact, the CW acknowledged it was possible.⁴ *See* AC ¶ 123.

13 Even putting all of that aside, Plaintiffs' October 2021 allegation that Skillz was wrong to
 14 *expect* in early 2021 to launch in India by the end of 2021 ignores that there was still time for the
 15 Company to execute on its goal. It is particularly specious for Plaintiffs to rely on the CW's alleged
 16 statements here, given the CW left Skillz in March 2021, well before the stated expansion target-
 17 date. AC ¶¶ 122-23. And even the CW does not claim that launching in India by the end of 2021
 18 was impossible—merely that Skillz would have to acquire additional resources to make it happen,
 19 hardly an impossibility in a newly public, growing company. AC ¶ 123. In any event, one CW's
 20 opinion, unaccompanied by any allegation that those who made the challenged statement shared
 21 those views, is not enough to plead falsity. *See Wochos*, 985 F.3d at 1194 (rejecting allegations of
 22 two employees' views that Tesla's production goal was "impossible" when unaccompanied by any
 23 allegation that defendants "ever accepted those employees' views"); *Mulquin v. Nektar*
 24 *Therapeutics*, 510 F. Supp. 3d 854, 866 (N.D. Cal. 2020) (rejecting falsity allegations based on the
 25 CW's unsupported statements of purported "disagreement" with defendants).

26

27

28 ⁴ Plaintiffs again try to invoke the Wolfpack Report, claiming that it revealed that Skillz's platform
 did not support "scaling the business internationally," but Wolfpack makes no mention of that
 topic. *Compare* AC ¶ 165 with Ex. B (Wolfpack Report).

1 3. Skillz Did Not Misstate Its Synchronous Play Capabilities

2 Plaintiffs' challenge to statements regarding Skillz's enablement of synchronous game play
 3 appears to confuse the service Skillz provides and the games that third parties develop. AC ¶¶ 125-
 4 29. The Company stated that Skillz "enable[s] game genres that can be played: (i) asynchronously;
 5 (ii) turn-based synchronously; or (iii) synchronously." AC ¶¶ 125-27. Plaintiffs allege that the
 6 Company did not enable synchronous game play because the Company stated in a shareholder
 7 letter for the first fiscal quarter of 2021 that game developers were testing synchronous game play
 8 technology. AC ¶ 174; Ex. L (Q1 2021 Shareholder Letter) at 1. In other words, some third-party
 9 app developers were developing *their own* synchronous games—which they would not have been
 10 able to do if Skillz had not already enabled that functionality.⁵ *See Mazzaferro v. Aruba Networks,*
 11 *Inc.*, 2014 WL 12680773, at *1 (N.D. Cal. Aug. 1, 2014) (granting dismissal on falsity grounds
 12 where plaintiffs' claims were "not so inconsistent with the challenged statements as to support an
 13 inference that they were false").⁶

14 4. Skillz Did Not Misrepresent Its Paid User Engagement

15 The basis for Plaintiffs' challenge to statements about Skillz's platform growth and its
 16 effect on overall user engagement is difficult to decipher. AC ¶¶ 131-33. This is not surprising, as
 17 Skillz's broad comments about user experience and its "vibrant and growing ecosystem" are non-
 18 actionable puffery, too generic and aspirational to constitute a false statement of fact. Plaintiffs
 19 nevertheless appear to claim the statements were misleading because Plaintiffs assert (without any

20 21 ⁵ Plaintiffs rely on the CW to assert that synchronous game play was "brand new" and that Skillz
 22 was still working out "bugs." But working through bugs on a new feature is a far cry from not
 23 having the feature at all. *See Lopes v. Fitbit, Inc.*, 2020 WL 1465932, at *6 (N.D. Cal. Mar. 23,
 24 2020) (dismissing claims that statements about product features were false due to bugs or defects
 25 because the fact that "a new program has kinks does not make a positive statement about the
 26 program false"). And Plaintiffs do not allege how the CW would have known the technical
 27 capabilities of the Skillz platform during the CW's few months in an unspecified role or roles in
 28 the revenue or marketing groups. *See In re Intrexon Corp. Sec. Litig.*, 2017 WL 732952, at *4 n.3
 (N.D. Cal. Feb. 24, 2017) (rejecting reliance on CW allegation that defendant's technology "never
 worked" where there were "no facts to suggest CW1's personal knowledge of the technology or
 the reliability of her opinion").

6 ⁶ Plaintiffs also purport to challenge statements in the March 2021 Offering materials that were
 allegedly "corrected" in the Wolfpack Report. *See, e.g.*, AC ¶ 127 (alleging that statements related
 to synchronous game play were also in the March 2021 Offering materials). But the Wolfpack
 Report was issued *before* the March 2021 Offering materials, and as such, Plaintiffs' falsity
 arguments as to the statements in those materials fail.

1 stated basis) that the statements were not true for the one percent of Skillz users who spend more
 2 than \$500 or \$1000 on the Skillz platform. AC ¶ 133. Plaintiffs do not claim that Skillz actually
 3 made any statements that were specific to that group.

4 *First*, Skillz's statements about a "stickier, more engaging, and continuously improving"
 5 user experience and a "vibrant and growing ecosystem" are non-actionable puffery. *See Police*
 6 *Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1060 (9th Cir. 2014) ("Statements
 7 of mere corporate puffery, vague statements of optimism like 'good,' 'well-regarded,' or other feel
 8 good monikers are not actionable because professional investors, and most amateur investors as
 9 well, know how to devalue the optimism of corporate executives."); *In re Nimble Storage, Inc.*,
 10 2016 WL 7209826, at *10 n.16 (N.D. Cal. Dec. 9, 2016) (statements concerning "growing . . .
 11 base" and "vibrant" demand inactionably vague). Courts have also considered statements referring
 12 to "continuing improvements" as non-actionable optimism. *See Wozniak v. Align Tech., Inc.*, 850
 13 F. Supp. 2d 1029, 1036 (N.D. Cal. 2012) (citing *In re Cornerstone Propane Partners, L.P. Sec.*
 14 *Litig.*, 355 F. Supp. 2d 1069, 1087 (N.D. Cal. 2005)); *see also Shenwick v. Twitter, Inc.*, 282 F.
 15 Supp. 3d 1115, 1141-42 (N.D. Cal. 2017) (rejecting statements that the company was making its
 16 "algorithms better and driving continuous improvements in engagement" as non-actionable
 17 puffery).

18 *Second*, Plaintiffs offer no basis other than their own say-so for the conclusion that Skillz's
 19 general references to "users" applied universally to every single user or every possible slice of its
 20 user base. Skillz did not limit its references to "users" in the challenged statement to any particular
 21 spending level, and it is an unreasonable inference that general statements about "users" were
 22 necessarily intended to describe only the use patterns of the minority of users who spend \$500 or
 23 more on the Skillz platform, rather than the entire overarching user base. *See Hessong v. Pinterest,*
 24 *Inc.*, 2021 WL 4339193, at *6 (N.D. Cal. Sept. 23, 2021) (rejecting falsity allegations where "there
 25 are no facts alleged showing why the lukewarm and generalized growth statements about users"
 26 could be false concerning unrelated "growth rate or ARPU"). Plaintiffs do not challenge what
 27 Skillz actually said—*i.e.*, that Skillz's number of users was consistently increasing, and that user
 28

1 experiences were improving—or point to any corrective disclosure regarding the 1% of users that
 2 they cherry-pick for their challenge

3 5. Skillz Presented Its Financial Results Appropriately

4 Plaintiffs argue that Skillz (a) should have disclosed particular revenue submetrics earlier
 5 than it did, and the failure to do so somehow violated SEC disclosure rules; and (b) should have
 6 been more clear that its revenues only came from paying users.⁷ AC ¶¶ 135-51. These challenges
 7 are pleaded under the Exchange Act only. None holds water.

8 a. Skillz Was Not Required To Report Plaintiffs' Preferred Submetrics

9 First, Plaintiffs challenge the Company's financial statements as misleading because the
 10 Company has expanded the number of submetrics it discloses in recent periods, for example, by
 11 including in its most recent filings breakdowns of paying users and Skillz's average revenue per
 12 paying user ("ARPPU"). AC ¶¶ 141-51. Plaintiffs argue that the failure to include these specific
 13 figures in prior periods rendered revenue numbers misleading.

14 But it is well settled that companies are not prohibited from changing what particular
 15 submetrics of revenue they disclose, and indeed, courts recognize that there are "many potential
 16 reasons" why a company might change its reporting of revenue metrics that "have no relation to
 17 the prior falsity of [those] metric[s]." *In re Solarcity Corp. Sec. Litig.*, 274 F. Supp. 3d 972, 1002
 18 (N.D. Cal. 2017); *see also In re Lyft Inc. Sec. Litig.*, 484 F. Supp. 3d 758, 773 (N.D. Cal. 2020)
 19 (dismissing securities action based on changes in types of reported metrics because there is "no
 20 basis for imposing a duty to include the same metrics in subsequent financial statements"). This
 21 makes sense: as the Ninth Circuit acknowledges, "[n]o matter how detailed and accurate disclosure
 22 statements are, there are likely to be additional details that could have been disclosed but were
 23 not." *Intuitive Surgical*, 759 F.3d at 1061. For that reason, there is no "rule of completeness for

24 7 Plaintiffs allege in passing that Skillz overstated its revenue from "bonus cash" (that is, user
 25 incentives that can only be used to enter into future paid contests, *see Ex. F* (2020 Form 10-K), at
 26 41), and that the Eagle Eye Report purportedly "revealed" that Skillz misrepresented revenues by
 27 including "bonus cash." *See, e.g., AC ¶¶ 2, 160-70.* Plaintiffs do not, however, actually challenge
 28 any Skillz statement of revenue. The reason for that is simple: Skillz explained that promotions
 like "bonus cash" are recognized either as a reduction of revenues or a sales and marketing
 expense, either way being appropriately factored into the Company's audited revenues. *Ex. F*
 (2020 Form 10-K), at 50.

1 securities disclosures.” *In re Dropbox Sec. Litig.*, 2020 WL 6161502, at *6 (N.D. Cal. Oct. 21,
 2 2020) (concluding that factually accurate annual report was not misleading where it did not include
 3 particular negative details). Notably, though Plaintiffs want more, they do not (and cannot) allege
 4 that the metrics that they were provided failed to comply with GAAP.⁸ See *Turner v. MagicJack
 5 Vocaltec, Ltd.*, 2014 WL 406917, at *9 (S.D.N.Y. Feb. 3, 2014) (dismissing claims on falsity
 6 grounds where auditors opined the financial statements were prepared in accordance with GAAP
 7 and stood by their conclusion).

8 Skillz was not under any duty to disclose any specific submetric of revenue. See *Brody v.
 9 Transitional Hosps., Corp.*, 280 F.3d 997, 1006 n.8 (9th Cir. 2002) (“[i]f a company reports that
 10 its sales have risen from one year to the next, that statement is not misleading even though it does
 11 not include a detailed breakdown of the company’s region by region or month by month sales.”).
 12 That is, companies are only required to disclose “known trends or uncertainties” that the company
 13 “expects will have a material favorable or unfavorable impact on net sales or revenues or income
 14 from continuing operations.” *In re NVIDIA Corp. Sec. Litig.*, 768 F. 3d 1046, 1054 n.8 (9th Cir.
 15 2014). Plaintiffs have not alleged the existence of any adverse trend, much less one that would
 16 have an impact that a reasonable investor would have viewed as “significantly alter[ing] the ‘total
 17 mix’ of information made available,” which would be required to state a securities claim.⁹ *Matrixx
 18 Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011); see also *Hessong*, 2021 WL 4339193, at *7
 19 (dismissing securities fraud action where plaintiff alleged “no facts... supporting the existence of
 20 negative ‘trends’” in domestic MAUs or ARPU at the time the challenged statements were made).

21 Plaintiffs try to suggest these metrics are important because they were a harbinger of a

22
 23 ⁸ These well-settled rules also defeat Plaintiffs’ fallback claim that the Skillz Defendants violated
 24 SEC disclosure rules. AC ¶¶ 152-56. Plaintiffs challenge the Company’s representation to the SEC
 25 of the primary metrics it used to manage its business in October 2020—which the SEC did *not*
 26 challenge—based solely on the subsequent disclosure of different key metrics. But changes in
 27 metric reporting “does not show that the previous reporting . . . was false or misleading.” *Solarcity*,
 274 F. Supp. 3d at 1002; see also *Ironworkers Local 580-Joint Funds v. Linn Energy, LLC*, 29 F.
 28 Supp. 3d 400, 426 (S.D.N.Y. 2014) (“Plaintiff’s effort to transform that business decision [to
 change the way it calculated certain metrics] into some sort of admission that statements made in
 prior reporting periods were false and materially misleading is entirely misguided.”).

⁹ ARPPU may have declined in certain portions of 2020, but it increased in the first quarter of
 2021, so any declines were not a trend. See Ex. L (Q1 2021 Shareholder Letter).

1 future financial collapse. *See* AC ¶ 151. Not only are there no allegations supporting this
2 suggestion, it is also demonstrably untrue. Plaintiffs cite metrics from the second half of 2020, AC
3 ¶ 135, but as of the date of the Amended Complaint, and contrary to Plaintiffs' suggestion, Skillz's
4 revenues had continued to increase. *See, e.g.*, Ex. G (Q3 2021 Press Release). Put simply,
5 Plaintiffs' doomsday association of a particular submetric with the crumbling of Skillz's financial
6 results has no basis and is also inconsistent with reality.

7 *Reinschmidt v. Zillow, Inc.* is instructive. In *Zillow*, plaintiffs alleged that defendants had a
8 duty to disclose “essentially flat” ARPU to “counter-balance the positive statements Zillow made”
9 about the growth of its business. 2014 WL 5343668, at *6 (W.D. Wash. Oct. 20, 2014). The court
10 rejected plaintiffs’ falsity allegations both because they did not “identify any affirmative statement
11 made by Defendants that ARPU had increased” and because it was “entirely possible” that
12 increased revenues, but decreased ARPU, was a result of selling cheaper subscriptions. *Id.* at *5-
13 7. The same is true here. Plaintiffs do not identify a single statement that ARPPU was increasing
14 in 2020. And it is certainly not surprising that Skillz could continue to grow revenue by increasing
15 the number of paying users (which were increasing in number throughout this period) even if
16 paying users generated slightly less revenue (on average) than when that group was smaller.

17 Plaintiffs do not—and cannot—allege that Skillz’s reported revenues were inaccurate, nor
18 that those revenues even decreased throughout the putative class period. Plaintiffs’ claims amount
19 to nothing more than a hindsight desire for additional submetrics of revenue at an earlier date, and
20 that is not sufficient to support any of their claims.

b. Skillz's Revenue Disclosures Were Not Misleading

22 Plaintiffs’ argument that Skillz’s disclosures were misleading because they attributed
23 revenue increases to MAUs rather than specifically saying “paying” MAUs is just not plausible.
24 *Wochos v. Tesla*, 2019 WL 1332395, at *6 n.2 (N.D. Cal. Mar. 25, 2019). The Company made
25 very clear—and Plaintiffs admit—that at this stage, Skillz was generating revenues exclusively
26 from paying users. *See* Ex. M (2020 Form 10-K/A) at 42; Ex. I (11/17/20 Form S-4/A) at 182; AC
27 ¶ 5. The Company also disclosed that only 10% of its MAUs enter into paid contests. Ex. I
28 (11/17/20 Form S-4/A) at 168. And Plaintiffs acknowledge that Skillz stated that increased revenue

1 was driven by the acquisition of “new *paying* users.” AC ¶ 137-38 (emphasis added). A
 2 reasonable investor could not have been misled as to the source of Skillz’s increased revenues by
 3 Skillz not using the word “paying” more often in its financial statements.

4 6. Skillz Did Not Misrepresent SPAC-Related Warrants

5 On April 12, 2021, the SEC issued, for the first time, a release regarding its views of how
 6 SPAC warrants should be classified as liabilities rather than equities under GAAP. *See Ex. N*
 7 (5/4/21 Form 8-K). This statement differed from how the vast majority of SPACs had accounted
 8 for such warrants.¹⁰ Following the release, the Company (and virtually every other SPAC) decided
 9 to conform its 2020 annual financial statements to the SEC’s views set forth in its April 2021
 10 statement. *Id.* That does not amount to a false statement, particularly where the original financial
 11 statements conformed to generally accepted industry standards at the time. *See In re Bristol-Myers*
 12 *Squibb Sec. Litig.*, 312 F. Supp. 2d 549, 565 (S.D.N.Y. 2004) (“Restatement of financial results...
 13 without corresponding fraudulent intent, [is] not sufficient to state a securities fraud claim.”); *In*
 14 *re Ramp Networks, Inc. Sec.*, 201 F. Supp. 2d 1051, 1066 (N.D. Cal. 2002) (rejecting falsity
 15 allegations related to restatement caused by “changed circumstances”); *In re N. Am. Acceptance*
 16 *Corp. Sec. Cases*, 513 F. Supp. 608, 636 (N.D. Ga. 1981) (rejecting securities fraud claims based
 17 on restatement due to changed accounting guidance because original financial statements were
 18 “consistent with generally accepted auditing standards at the time [they] were issued”).

19 Even putting aside that the new SEC position impacted hundreds of similarly situated
 20 companies (without triggering an onslaught of enforcement actions or securities lawsuits),
 21 Plaintiffs do not come close to pleading falsity with respect to the warrants. Plaintiffs do not allege
 22 that the Company’s accounting decisions were wrong at the time of the original financial
 23 statements. And in any event, courts have repeatedly confirmed that GAAP accounting judgments
 24 are statements of opinion. *See In re AmTrust Fin. Servs., Inc. Sec. Litig.*, 2019 WL 4257110, at
 25 *12-13 (S.D.N.Y. Sept. 9, 2019) (holding that where financial statements “reflect a result achieved
 26 by applying judgments to objective historical facts,” they “reflect[] an opinion”); *see also*

27 28 ¹⁰ See, e.g., “Will SPAC Restatements Trigger Shareholder Litigation?”, XI Nat’l L. Rev. 348
 (Oct. 29, 2021), available at <https://www.natlawreview.com/article/will-spac-restatements-trigger-shareholder-litigation>.

1 *Rieckborn v. Jeffries LLC*, 81 F. Supp. 3d 902, 921-22 (N.D. Cal. 2015) (assessing financial
 2 statements resulting from accounting judgments as opinion statements); *Pearlstein v. BlackBerry*
 3 *Ltd.*, 93 F. Supp. 3d 233, 243 (S.D.N.Y. 2015) (assessing “subjective accounting choices” as
 4 opinions); *cf. In re Cirrus Logic Sec. Litig.*, 946 F. Supp. 1446, 1457 (N.D. Cal. 1996) (“GAAP is
 5 not a set of rules ensuring identical treatment of identical transactions; rather, it tolerates a range
 6 of reasonable treatments, leaving the choice among alternatives to management.”).

7 As discussed above, pleading the falsity of such opinion statements, requires particularized
 8 allegations showing *both* that the opinion was objectively wrong *and* that a defendant did not
 9 believe that opinion at the time or had no basis whatsoever to believe it. *See supra* Section IV.A.2.
 10 Plaintiffs do not plead any facts explaining why classifying warrants as equities *before* the SEC
 11 statement was objectively or subjectively false. Plaintiffs do not allege that, when Skillz published
 12 the original financial statements, its accounting judgments were objectively unreasonable or that
 13 any Defendant did not believe them. To the contrary, Skillz’s independent auditor (like the auditors
 14 of hundreds of other SPACs) signed off on the financial statements, which included the warrant
 15 treatment decision *and* its internal controls over financial reporting. *See* Ex. F (2020 Form 10-K)
 16 at 54. The SEC never directly questioned those financial statements (aside from generally stating
 17 its new position) or pursued any enforcement afterward. And Skillz explained that the SEC’s views
 18 “were not consistent with our historical interpretations of the specific provisions within our warrant
 19 agreements and our application of [the relevant accounting standards].” Ex. M (2020 Form 10-
 20 K/A) at 73. Plaintiffs’ attempt to generate a “false statement” out of a decision to conform to new
 21 SEC interpretations is baseless. *See KBC Asset Mgmt. NV v. DXC Tech. Co.*, 2021 WL 5626377,
 22 at *4 (4th Cir. Dec. 1, 2021); *Ramp*, 201 F. Supp. 2d at 1066 (rejecting falsity allegations as fraud
 23 by hindsight where restatement did not render challenged statements false when made).

24 **B. Plaintiffs Do Not Adequately Plead Scienter**

25 Even if Plaintiffs had identified a false or misleading statement (and they have not), their
 26 Exchange Act claims independently fail because they have not established a “strong inference” of
 27 an “intent to deceive, manipulate, or defraud.” *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*,
 28 540 F.3d 1049, 1061 (9th Cir. 2008). To survive a motion to dismiss, Plaintiffs’ factual allegations

1 of scienter must be “more than merely plausible or reasonable,” and they must give rise to an
 2 inference of scienter that is “at least as compelling as any opposing inference of nonfraudulent
 3 intent.” *Id.* at 1066. This requires facts strongly implying a defendant’s “contemporaneous
 4 knowledge that [a] statement was false when made.” *In re Cisco Sys. Inc. Sec. Litig.*, 2013 WL
 5 1402788, at *9 (N.D. Cal. Mar. 29, 2013).

6 To be clear, Plaintiffs do not even assert—much less allege particularized facts—that any
 7 speaker made any challenged statement knowing that it was false or otherwise unsupported.
 8 Instead, they resort to a litany of half-baked assertions that, whether considered individually or
 9 together, remain far less compelling than the inference that the Skillz Defendants did not believe
 10 they were misleading the market. *See In re Diebold Nixdorf, Inc., Sec. Litig.*, 2021 WL 1226627,
 11 at *15 (S.D.N.Y. Mar. 30, 2021) (granting dismissal on scienter grounds where independently
 12 insufficient scienter allegations remained insufficient when considered collectively, *i.e.*, “zero plus
 13 zero (plus zero plus zero plus zero) cannot equal one”).

14 **Access to Unspecified Information.** Plaintiffs broadly allege that Skillz and the Officer
 15 Defendants received “material non-public information” that “reflect[ed] the true facts regarding
 16 Skillz.” AC ¶¶ 178-79. But Plaintiffs do not specify what information was received, when it was
 17 received, or how it bears on any of the challenged statements, as they must to plead scienter with
 18 particularity. *See, e.g., Veal v. Lendingclub Corp.*, 2020 WL 3128909, at *14 (N.D. Cal. June 12,
 19 2020). At most, Plaintiffs refer to their CW’s assertion that certain metrics were “available to
 20 Skillz management through the Tableau Dashboard.” AC ¶ 181 (emphasis added). But mere access
 21 to hypothetically contradictory information is not enough, and Plaintiffs do not allege that any
 22 Skillz Defendant ever accessed the Tableau Dashboard much less concluded it undermined their
 23 public statements.¹¹ *See Intuitive Surgical*, 759 F.3d at 1063 (“Mere access to reports... is
 24 insufficient to establish a strong inference of scienter.”).

25 **“Contradictory” Statements.** Plaintiffs next allege that the Skillz Defendants made
 26 contradictory statements supposedly “conceding the falsity” of certain challenged statements and

27 ¹¹ For individuals other than Ms. Aguirre, Plaintiffs also cite certifications under the Sarbanes-
 28 Oxley Act (“SOX”). AC ¶ 182. It is well-settled that SOX certifications do not support an inference
 of scienter. *See, e.g., Rok v. Identiv, Inc.*, 2017 WL 35496, at *15 (N.D. Cal. Jan. 4, 2017).

1 therefore “indicative of their scienter.” AC ¶ 183. But none of the cited statements are actually
 2 contradictory, much less do they demonstrate that any challenged statement was knowingly false
 3 when made. *See, e.g., Paciga v. Invuity Inc.*, 2019 WL 3779694, at *6 (N.D. Cal. Aug. 12, 2019)
 4 (requiring plaintiffs to allege particularized information known by defendants that contradicted
 5 their statements at the time they were made).

6 *First*, Plaintiffs argue that statements that the Company “enable[s] game genres that can be
 7 played... synchronously” were contradicted by a later statement that developers were “actively
 8 testing synchronous content on our platform.” *See* AC ¶ 183; Ex. L (Q1 2021 Shareholder Letter)
 9 at 1. Developers’ testing of synchronous games on Skillz’s platform *confirms* the accuracy of the
 10 Company’s statements. Skillz does not create games. It provides a platform for games developed
 11 by others. Skillz enables synchronous play, but it is dependent on developers to create, test, and
 12 deploy synchronous game play on their apps through the Skillz platform. These two statements do
 13 not contradict each other, much less amount to a strong inference of scienter.

14 *Second*, Plaintiffs claim that the statement accompanying certain financial results in 2021
 15 that paying-MAUs was a primary metric used to gauge *revenues* and attributing revenues to
 16 paying-MAUs somehow demonstrates scienter as it relates to the October 2020 statement that
 17 paying-MAUs was not a primary metric used to manage the business “as our primary focus is on
 18 growing the total user traffic on our platform.” AC ¶¶ 184-85, 187. According to Plaintiffs’ CW,
 19 “when [Skillz] went public, they realized Wall Street cared about MAUs.” AC ¶ 186. Putting aside
 20 the incongruity of Plaintiffs’ allegations and that the Company has consistently disclosed its
 21 MAUs, the Company has always been clear that paying users are what currently drive its revenues.
 22 *See, e.g.*, Ex. E (11/30/20 Form S-4/A) at 181. Indeed, in the same SEC correspondence that
 23 Plaintiffs allege was misleading, Skillz disclosed the precise number of paying-MAUs for the six
 24 months ended June 30, 2020, as well as for 2019 and 2018. Ex. A (10/13/20 SEC Correspondence).
 25 Skillz then explained that, at that time, its focus was “on growing total user traffic... based on the
 26 expectation that, *over time*, we will be able to monetize all users as the content on our platform
 27 evolves and we add new forms of monetization such as advertising.” *Id.* (emphasis added).
 28 Plaintiffs offer no “contemporaneous facts that would establish a contradiction between the alleged

1 materially misleading statements and reality.” *In re Cloudera*, 2021 WL 2115303, at *11. Paying-
 2 MAUs has always been disclosed as the sole source of *revenue*. The purportedly inconsistent
 3 statement in October 2020 referred to the metric the Company was then focused on in terms of
 4 growing its business (MAUs), which it explained arose from the goal of monetizing every user on
 5 the Skillz platform at some point in the future. Again, those two statements are not at odds with
 6 each other and do not demonstrate scienter.

7 *Third*, Plaintiffs claim that Defendants knew the Skillz platform had “certain technical
 8 limitations that would have slowed Skillz[’s] ability to expand to international markets.” AC ¶ 189.
 9 Plaintiffs make no effort to explain what “technical limitations” existed. And even their CW’s
 10 allegations (albeit limited to when she left the Company in March 2021) that the Company needed
 11 additional support to be able to launch in India in 2021 inherently recognizes that such a launch
 12 was possible. *Id.* Plaintiffs allege no fact indicating that any Defendant did not believe that the
 13 Company could launch in 2021 at the time the challenged statements were made.

14 **“Refusal” to Answer Question.** Plaintiffs next argue that Mr. Paradise’s scienter is
 15 apparent from his “refus[al]” to answer a question regarding “slowing” downloads for certain
 16 games. AC ¶¶ 192-93. But as noted above in discussing how Mr. Paradise’s response was not a
 17 false statement, *see supra* Section IV.A.I, Mr. Paradise answered the question: the analyst asked
 18 how perceived decreased downloads was “shaping the business going forward,” AC ¶ 115, and
 19 Mr. Paradise explained that the Company’s “previous number on[e] titles, [] actually all continued
 20 to grow in [Gross Marketplace Volume (or, in other words, revenue)], even after being displaced
 21 from their position.” *Id.* That is not surprising: users normally only download an app once but then
 22 continue to use it indefinitely, meaning that app downloads may decrease (so that the app may no
 23 longer be the most downloaded game on the platform) even as the app continues to grow in the
 24 total amount of entry fees paid by users for that game’s contests. *See Ex. E (11/30/20 Form S-4/A)*
 25 at 3. Again, Plaintiffs have not identified any fact that would render this exchange inaccurate,
 26 much less a strong inference of scienter. *See In re AnaptysBio, Inc.*, 2021 WL 4267413, at *10
 27 (S.D. Cal. Sept. 20, 2021) (rejecting “evasive” answers to analyst questions as basis for scienter).

28 **Core Operations.** Plaintiffs next allege that the Skillz Defendants must have known about

1 the Company’s “user base and the trends that impact the Company’s business” because the Skillz
 2 platform is its “core operation.” AC ¶¶ 194-98. But Plaintiffs fail to meet the significant threshold
 3 for relying on this theory to raise a compelling inference of scienter. *See Percoco v. Deckers*
 4 *Outdoor Corp.*, 2013 WL 3584370, at *5 (D. Del. July 8, 2013) (“Only in rare instances can core
 5 operations alone allow inferences of scienter.”). What is missing from Plaintiffs’ pleading is how
 6 knowledge of Skillz’s business metrics in general has any bearing on their claims. Plaintiffs allege
 7 Skillz Defendants had access to “every possible key metric,” AC ¶ 197, but do not explain how
 8 any of those metrics undermined the challenged statements—especially when Plaintiffs do not
 9 dispute that nearly all of those metrics were positive, such as steadily increasing revenues or paying
 10 MAUs. Without tying any supposedly known metric to the falsity of a challenged statement,
 11 Plaintiffs’ core operations theory fails. *See Manger v. LeapFrog Ents., Inc.*, 252 F. Supp. 3d 837,
 12 847 (N.D. Cal. 2017) (rejecting core operations theory of scienter where what has been “missing
 13 from the beginning are facts that the [metrics purportedly known by defendants] meant that the
 14 [challenged] statements . . . were false or misleading”); *Veal*, 423 F. Supp. 3d at 816 (rejecting
 15 scienter claim based on knowledge of “day-to-day workings of the company’s business” absent
 16 allegations of “specific information conveyed to management and related to the fraud”).

17 **Stock Sales.** Plaintiffs also urge the Court to draw an inference of scienter based on stock
 18 sales by four Skillz Defendants in the March 2021 Offering. AC ¶¶ 199-201. Plaintiffs do not,
 19 however, allege that any of those stock sales were “unusual” or “suspicious” in any way. *See In re*
 20 *Pixar Sec. Litig.*, 450 F. Supp. 2d 1096, 1104 (N.D. Cal. 2006). Indeed, the Amended Complaint
 21 lacks any allegation of any individual’s stock sale history. Moreover, the four insiders sold as little
 22 as 2.5% and no more than 13.49% of their Skillz holdings in the offering. AC ¶ 201. And Plaintiffs
 23 do not allege that any of the five other Skillz Defendants sold *any* shares. Sales of a small portion
 24 of sellers’ holdings by only a few defendants has been rejected as a basis for inferring scienter. *See*
 25 *Metzler*, 540 F.3d at 1067 (noting that “[w]e typically require larger sales amounts—and
 26 corroborative sales by other defendants—to allow insider trading to support scienter” where one
 27 defendant made no sales and another 37% of his holdings); *see also Ronconi*, 253 F.3d at 435
 28 (insider selling 17% of holdings insufficient to plead a compelling inference of scienter).

1 **CFO Retirement.** Plaintiffs also refer to Mr. Henry’s “resign[ing]” as Skillz’s chief
 2 financial officer as somehow being indicative of scienter. AC ¶ 202. But Mr. Henry *retired* from
 3 his role as planned after assisting in taking Skillz public. *See Ex. O* (5/5/21 Form 8-K). “[T]he bare
 4 fact of [Mr. Henry’s] retirement cannot support [Plaintiffs’] allegations of scienter.” *Zucco*, 552
 5 F.3d at 1002; *see also Intrexon*, 2017 WL 732952, at *6 (executive’s resignation did not support
 6 inference of scienter absent allegations of “suspicious circumstances” accompanying resignation).

7 **C. Plaintiffs Do Not Adequately Plead Loss Causation**

8 Plaintiffs’ Exchange Act claims also fail on the independent ground that Plaintiffs have not
 9 pleaded loss causation, which requires a showing that “the revelation of [the alleged]
 10 misrepresentation or omission was a substantial factor in causing a decline in the security’s price.”
 11 *Mulquin*, 510 F. Supp. 3d at 870. Typically, this requires allegations “that the defendant revealed
 12 the truth through ‘corrective disclosures’ which caused the company’s stock price to drop and
 13 investors to lose money.” *Id.* But there was no such revelation here: Plaintiffs have not pleaded
 14 any corrective disclosures that caused their alleged losses.

15 1. The Short Reports Are Not Corrective Disclosures

16 Plaintiffs’ primary theory of loss causation fails at the threshold because it is based on self-
 17 interested short reports that do not “reveal” any “truth” to the market. *See, e.g.*, AC ¶¶ 210-11.

18 Beyond the fact that Courts routinely reject self-interested short seller reports as “corrective
 19 disclosures,”¹² the short reports here did not “correct” anything. The Wolfpack Report makes
 20 various negative predictions about Skillz, two of which Plaintiffs latch onto: that certain game

21 ¹² See *Mulquin*, 510 F. Supp. 3d at 873 (rejecting loss causation theory based on report by short
 22 seller “who had a financial interest in driving [the company’s] stock price down and who
 23 disclaimed any representation, express or implied, as to the accuracy, timeliness, or completeness
 24 of any such information or with regard to the results obtained from its use”); *see also Grigsby v.
 25 BofI Holding, Inc.*, 979 F.3d 1198, 1208 (9th Cir. 2020) (affirming dismissal where loss causation
 26 relied on short seller’s analysis that “did not require any expertise or specialized skills beyond
 27 what a typical market participant would possess” and “included the disclaimer that the author
 28 makes no representation as to the accuracy or completeness of the information”); *Intrexon*, 2017
 WL 732952, at *7 (granting dismissal on loss causation grounds where loss causation was based
 on short report); *Bonanno v. Cellular Biomedicine Grp., Inc.*, 2016 WL 2937483, at *5 (N.D. Cal.
 May 20, 2016) (same, noting that short seller report that “contain[ed] merely the opinions of the
 author [which] cannot be categorically labeled as ‘the truth’”); *Meyer v. Greene*, 710 F.3d 1189,
 1199 (11th Cir. 2013) (a short seller’s “opinion, standing alone, cannot reveal[] to the market the
 falsity of a company’s prior factual representations”).

1 downloads were decreasing and that Skillz's platform purportedly did not "support synchronous
 2 game play." AC ¶ 165. But according to Wolfpack itself, its "opinions" were based on information
 3 "obtained from public sources"—meaning it was not revealing concealed information.¹³ Ex. B
 4 (Wolfpack Report) at 15; *see also id.* at 2. This negative spin on public information is precisely
 5 what courts reject as the basis of loss causation. *See Meyer*, 710 F.3d at 1199 ("If every analyst or
 6 short-seller's opinion... could form the basis for a corrective disclosure, then every investor who
 7 suffers a loss in the financial markets could sue under § 10(b) using an analyst's negative analysis
 8 of public filings as a corrective disclosure. That cannot be—nor is it—the law.").¹⁴ And, in any
 9 event, none of the challenged statements has anything to do with the three games whose downloads
 10 Wolfpack claimed were declining, *see supra* Section IV.A.1, and Plaintiffs elsewhere admit that
 11 Skillz supported synchronous play, *see supra* Section IV.A.3 & AC ¶ 174.

12 Plaintiffs' reliance on the Eagle Eye Report published on Twitter is even weaker. AC ¶¶
 13 169-171. Like the Wolfpack Report, the Eagle Eye Report states it is based on a review of Skillz's
 14 "publicly available financial information" and cites only to the Company's public filings,
 15 Wikipedia, and public news articles related to the market in general or unrelated companies. *See*
 16 Ex. C (Eagle Eye Report). Repackaging public information in a negative way is not a corrective
 17 disclosure. *See Intrexon*, 2017 WL 732952, at *7.

18 Notably, the short reports were followed by only temporary stock drops. AC ¶¶ 168, 171.
 19 Four days after the Wolfpack Report, Skillz's share price exceeded the closing share price on the
 20 day before the March 8 report. *See* Ex. D (Yahoo! Finance). And Skillz's share price likewise
 21 recovered just two days after the Eagle Eye Report. *Id.* These quick recoveries after modest price
 22 declines "refute[] the inference that the alleged concealment of this particular fact caused any
 23 material drop in the stock price." *See, e.g.*, *Wochos*, 985 F.3d at 1198.

24 _____
 25 ¹³ The Wolfpack Report refers to statements from former employees, but none of those statements
 26 bears on any of the challenged statements. *See id.* at 15 (discussing purported former employees'
 27 sentiments about Mr. Paradise). And in any event, the unidentified former employees do not meet
 the threshold of reliability required of confidential witnesses. *See Zucco*, 552 F.3d at 995.

28 ¹⁴ In addition, the Wolfpack Report was published before the final registration statement and
 prospectus for the March 2021 Offering—so it could not have corrected any price inflation based
 on alleged misstatements in the March 2021 Offering documents.

1 2. None Of The Cited Disclosures “Corrects” Any Challenged Statement

2 As a fallback to their insufficient short-seller-based loss causation theories, Plaintiffs pivot
 3 to a series of unrelated disclosures on May 4, 2021, as allegedly revealing some unknown fraud.
 4 AC ¶¶ 172-76. First, Plaintiffs point to the Company’s incorporation of new SEC interpretations
 5 of the treatment of SPAC-related warrants into its 2020 annual financial statements. AC ¶¶ 172-
 6 73. But again, the SEC issued new statements on the treatment of warrants, which were otherwise
 7 subject to GAAP and ASC rules that required subjective management estimates and opinions.
 8 Skillz’s decision to revise its existing financial statements to conform them to the new
 9 interpretation from the SEC does not amount to the revelation of some fraudulent accounting
 10 practices, and the May 4, 2021 restatement therefore cannot form the basis of loss causation. *See*
 11 *Lechner v. Infusystem Holdings, Inc.*, 2017 WL 11593803, at *2, *9 (C.D. Cal. Dec. 15, 2017)
 12 (rejecting loss causation theory where “there was nothing” in the company’s financial restatement
 13 “indicating fraud—only that an error occurred resulting in overstated revenues”); *Loos v.*
 14 *Immersion Corp.*, 762 F.3d 880, 887 (9th Cir. 2014) (affirming dismissal based on failure to allege
 15 that a “revelation of fraudulent activity” caused the stock price decline).

16 Plaintiffs also allege that Skillz’s May 4, 2021 stockholder letter noted that third party app
 17 developers were “actively testing synchronous content.” AC ¶ 174. This statement does not reveal
 18 the falsity of any challenged statement. *See supra* Section IV.A.3. To the contrary, it confirms that
 19 app creators were utilizing the Skillz platform to develop synchronous game play.¹⁵

20 Notably, Plaintiffs do not allege any corrective disclosure that relates in any way to their
 21 challenged statements regarding expansion into India, paid user engagement, and/or paying-MAUs
 22 or ARPPU. Any alleged stock price decline purportedly caused by the short reports or the May 4,
 23 2021 disclosures thus could not have revealed any supposed fraud related to those topics.

24 In sum, while Skillz’s stock price may have temporarily fallen on certain dates, the
 25 disclosures on those dates do not reveal the “truth” of any false statement, and thus do not amount
 26 to corrective disclosures sufficient to plead loss causation. *Mulquin*, 510 F. Supp. 3d at 870.

27
 28 ¹⁵ Plaintiffs also reference Mr. Henry’s retirement but do not tie it to any challenged statement or
 explain what fraud it supposedly revealed, so it has no bearing on loss causation. *See* AC ¶ 174.

1 **D. The Securities Act Claims Fail For Lack Of Standing**

2 The Securities Act claims also fail because the only Plaintiff to assert such claims—
 3 Plaintiff Tinkelman—has not adequately alleged facts tracing his purchase of shares to the
 4 Company’s secondary offering. AC ¶¶ 236-62. To plead Securities Act standing, plaintiffs “must
 5 either have ‘purchased shares in the offering made under the misleading registration statement,’ or
 6 purchased shares in the aftermarket ‘provided they can trace their shares back to the relevant
 7 offering.’” *Pirani v. Slack Techs., Inc.*, 445 F. Supp. 3d 367, 378 (N.D. Cal. 2020) (quoting *In re*
 8 *Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013)). This is a particularly high
 9 bar where “there are multiple registration statements, in which case the plaintiff must prove that
 10 the purchased shares were issued under the allegedly false or misleading one, ‘rather than some
 11 other registration statement.’” *Id.* Courts routinely reject the “conclusory allegation” that a plaintiff
 12 “purchased [shares] directly traceable” to the offering, and that is all Plaintiff Tinkelman has pled
 13 here. Compare *Century Aluminum*, 729 F.3d at 1107 with AC ¶ 31 (alleging Plaintiff Tinkelman
 14 “purchased the Company’s common stock in and traceable to Skillz’s March 2021 Offering”).
 15 Allegations that a plaintiff purchased shares on the day of a secondary offering at the same offering
 16 price are “merely consistent with” being “traceable to the secondary offering” and are insufficient.
 17 *Thomas v. Magnachip Semiconductor Corp.*, 167 F. Supp. 3d 1029, 1055 (N.D. Cal. 2016).
 18 Plaintiff Tinkelman’s failure to plead Securities Act standing is fatal to those claims.¹⁶

19 **E. Any Control Person Claim Fails Along With The Other Claims**

20 Because Plaintiffs do not state a primary violation of the securities laws, their “control
 21 person” claims under Sections 15 or 20(a) necessarily fail. *See Rigel*, 697 F.3d at 886
 22 (“Section 20(a) and section 15 both require underlying primary violations of the securities laws.”).

23 **V. CONCLUSION**

24 For the reasons stated above, the Amended Complaint should be dismissed.

25 ¹⁶ Plaintiff Tinkelman also lacks standing for his Section 12(a)(2) claim against Skillz because he
 26 has not alleged that the Company “pass[ed] title to” Skillz stock to him, nor “engage[d] in
 27 solicitation of [the] securities sales for financial gain.” *In re Harmonic, Inc. Sec. Litig.*, 2006 WL
 28 3591148, at *9 (N.D. Cal. Dec. 11, 2006). Plaintiff Tinkelman’s conclusory assertion that Skillz
 “promoted and sold shares for [its] own benefit” is insufficient. See *Violin Memory*, 2014 WL
 5525946, at *19 (dismissing Section 12(a)(2) claim for lack of standing where complaint included
 “conclusory statement” that plaintiff “bought common stock... directly” from underwriter).

1 Dated: December 23, 2021
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Respectfully submitted,

LATHAM & WATKINS LLP

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